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**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Amendment of Section 73.606)
(b), NTSC Table of Allotments and)
Section 73.622(b), DTV Table)
of Allotments (Buffalo, New York))

RM- _____

To: The Commission

PETITION FOR RULE MAKING

Western New York Public Broadcasting Association ("Association"), through its attorneys, hereby petitions for amendment of Section 73.606(b), the NTSC Table of Allotments, and for amendment of Section 73.622(b), the DTV Table of Allotments, in order to change the channel reserved for noncommercial educational use at Buffalo, New York from Channel *23 to Channel *17 in the NTSC Table of Allotments and from Channel *32 to Channel *43 in the DTV Table of Allotments. In support thereof, the following is shown:

1. The Association is the licensee of public television Station WNED-TV, Channel 17, and WNEQ-TV, Channel *23, Buffalo, New York. In addition, the Association is licensee of public broadcast Stations WNED-AM and WNED-FM, Buffalo, New York, as well as public FM Station WNJA(FM), Jamestown, New York. Station WNED-TV on Channel 17 is the oldest public television station in the State of New York, having operated since 1959. It is widely recognized in PBS circles as the producer of "The Mark Russell Comedy Specials" (which have run on PBS for a quarter of a century) and

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as co-producers of "Reading Rainbow", the multiple Emmy award winning children's reading series. In the Buffalo area, Station WNED-TV is widely known for its strong educational and community outreach programming in such areas as literacy, women's health, AIDS education, the environment and educational change. Station WNEQ-TV on Channel *23 has been operated by the Association as a second television channel providing supplementary noncommercial educational television service to the Buffalo area since 1987.

2. The Association respectfully requests that the Commission should, as expeditiously as possible, act to amend the NTSC and DTV Tables of Allotments in the following respects:

NTSC TABLE OF ALLOTMENTS

<u>City</u>	<u>Channel No.</u>	
	Present	Proposed
Buffalo, New York	2, 4, 7, 17	2, 4, 7, *17
	*23, 29, 49	23, 29, 49

DTV TABLE OF ALLOTMENTS

Buffalo, New York	14, *32, 33, 34	14, 32, 33, 34
	38, 39, 43 ¹	38, 39, *43 ²

¹The current DTV Table of Allotments specifies an asterisk on Channel 43, indicating that the channel is reserved for noncommercial educational use. This specification is a typographical error since Channel 43 is the companion channel for Channel 17, which is nonreserved.

²This petition is consistent with the Commission's policy regarding acceptance of petitions for rule making. The Commission has stated that it "will not accept petitions for rule making proposing to amend the existing TV Table of Allotments in Section 73.606(b) of our rules to add an allotment for a new NTSC station. Other petitions . . .

The changes proposed do not remove or add any channel, nor would they alter the total number of channels in Buffalo which are reserved for noncommercial educational use. They would simply change the reservation for noncommercial educational use from one channel to another, both in the NTSC and in the DTV Tables of Allotments.

3. As a result of the proposed changes, the Association will be able to provide a significantly enhanced programming operation at Station WNED-TV on reserved Channel *17 as the continuing primary public television service for Buffalo and Western New York. At the same time, the Association will be able to derive substantial new and necessary financial support for an endowment fund for its Station WNED-TV operations through assignment of its facility on unreserved Channel 23 to a commercial entrepreneur. In this connection, the Association's Board of Trustees Executive Committee, in a meeting held May 20, 1998, voted to commence the negotiating process to determine an appropriate assignee for the Channel 23 facility.

4. Adoption of the proposal would fully serve the public interest. The Association's decision to retain Station WNED-TV Channel *17 on a reserved basis is a recognition of the reality that viewers and members in the Buffalo region consider Station WNED-TV as the mainstay for area public television fare. Since Station WNED-TV operates on a non-reserved commercial channel, it would have been possible to propose assignment of that station to a commercial entity with far less complications (including any necessity to file a petition for rule making to change the asterisk). But

can continue to be filed. . . ." Advanced Television Systems, Sixth Further Notice of Proposed Rule Making, 11 FCC Rcd 10968, 10992 (1996). The Association's petition concerns only a change in the asterisk for existing channels, and does not propose to add an allotment.

such a decision would have been a disservice to Station WNED-TV's loyal viewers and members. Station WNED-TV is a long-established service with an area identification extending for almost 40 years. Station WNED-TV on Channel *17 is the more powerful of the two stations, has a more extensive signal reach, and is technically more advanced. Station WNED-TV's endowment from the sale of Station WNEQ-TV on Channel 23 will lead to enriched educational and community outreach services, will raise it to the position of a major television and radio producer, and will enable it to acquire additional programs for both television and radio. In this manner, Station WNED-TV will be able to consider extended broadcasting operations and extensive programming opportunities, permitting an enhanced combination of the best aspects of its current dual-channel operations. Indeed, the new proposed operation at Station WNED-TV on reserved Channel *17 will afford a concentrated, efficient and much more effective public broadcast service to the Buffalo area.

5. In addition, the proposed endowment fund will defray the costs, associated with converting by 2003 to digital broadcast service, which are not covered by federal and state grants. The Association estimates that the costs of conversion will be in the \$7-10 million range for a single station. In effect, the Association as licensee of two public television stations would acquire a total of eight broadcast channels with digital broadcast capability: four for Channel 17 and four for Channel 23. At present, Channel *17 operates on a full schedule but, because of cost constraints, Channel 23 does not. In the Association's view, the costs for programming of these eight channels will be prohibitive, the unused channels would be wasted, and the costs for converting two stations yielding eight channels makes neither economic nor programming sense. Instead,

following digital conversion, Station WNED-TV on Channel 17 could be increased from one channel to four and special receivers would enable viewers to select from among a menu of programs broadcast on Channel *17. While legislation has been introduced at the federal and state levels to provide public broadcasters grants to cover a portion of their digital conversion costs, public broadcast stations such as Station WNED-TV will be responsible for that share not covered.

6. Digital broadcast technology will place rising demands on broadcasters to acquire programming. The Association enjoys state-of-the-art production capabilities, which will be able to produce programs not only for its own broadcast, but also for broadcast by other television and radio stations. Through its endowment fund, programming by Station WNED-TV may be marketed not only to public broadcast stations, but also to commercial stations and cable operators. Beyond broadcast, there are also such other markets as schools, colleges and universities, libraries and rental stores. In its programming production, the Association hopes to capitalize upon the wealth of compelling stories in the Western New York and Southern Ontario region. In the Association's view, this would not only generate revenue but would call attention to this region as the setting for the stories. It would also highlight Station WNED-TV's reputation as a top-quality producer.

7. Continuation of effective operations on Channel 23 has been an expensive and unproductive enterprise. Maintenance of the Channel 23 facility has drained funds and resources from Channel *17 and it has been difficult to program Channel 23 on any extended hourly basis. Channel 23 operates only eight hours a day. That station has been utilized primarily for certain programming which would not normally appeal to

most of the viewing audience for Station WNED-TV. Accordingly, the Association has reached the conclusion that it would be wiser to dispose of Station WNEQ-TV on Channel 23 through assignment and dedicate the proceeds of any such assignment in trust for the maintenance and improvement of Station WNED-TV on Channel *17. Employees working at Channel 23 will be reassigned to Channel *17, resulting in no layoffs. In fact, the Association contemplates that the endowment and successful production ventures could lead to an increase in jobs, in order to handle digital television's multi-channel broadcasts as well as increased television and radio production. In all, the instant proposal will allow the Association to fully participate in the multi-channel DTV environment.

8. The Association's proposal permits a realistic marshaling of public broadcasting dollars. Various public broadcast bills and the admonitions of Congressional representatives have stressed that programming or operational duplication is inherently uneconomical and unwise in a period of declining funding at local, state and federal levels. In a similar vein, the Corporation for Public Broadcasting ("CPB"), following a year-long review of the industry, substantially revised its public television grant structure in March 1996. Beginning in FY 1997 CPB under the new structure and over a three year period has limited station locations in 17 overlap areas and recipients of multiple base grants to a single base grant. This new policy is designed to "encourage greater collaboration and more efficient use of system resources while preserving local initiatives." CPB Changes Public Television Grant Structure, released March 11, 1996. Similarly, the Association seeks to achieve self-sufficiency by a coordinated and con-

solidated public television service for the Buffalo area through reliance upon its primary public television Station WNED-TV on Channel *17 and through assignment of the Station WNEQ-TV Channel 23 facilities in order to provide an endowment fund for Station WNED-TV on Channel *17.

9. For all of the foregoing reasons, the Commission should grant the requested changes in the reserved channel for Buffalo, New York, both in the NTSC and the DTV Table of Allotments. Section 1.412(c) of the Commission's rules permits rules changes without prior notice of proposed rule making "in any situation in which the Commission for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest." The Association submits that the instant situation is one where prior notice need not and should not be pursued. The rules changes proposed do not add or delete any channel on either Table of Allotments. They would simply change the asterisk for noncommercial educational use from one existing channel to another existing channel. The end result is that one reserved channel will remain for Buffalo, New York. There is no substantive change in either Table of Allotments. In these circumstances, it is "unnecessary" to proceed with extended prior notice processes. Furthermore, such action on the Commission's part will materially assist in the processing of the contemplated application to be filed imminently for assignment of the license for Station WNEQ-TV on unreserved Channel 23 to a commercial entity. This assignment procedure is an essential element in the proposed arrangement by which the Association will remain as the licensee of Station WNED-TV on NTSC Channel *17 (and DTV Channel *43) with an endowment fund based upon the proceeds of the Channel 23 sale. Prolonged delay of the resolution of this proceeding through pursuit

of unnecessary prior notice procedures would be "contrary to the public interest".

Because of the close interrelationship between this rule making request and the assignment proposal, the Association urges the Commission to forego prior notice procedures in accord with Section 1.412(c).³

WHEREFORE, for the reasons set forth above, the Commission should amend the NTSC Table of Allotments at Buffalo, New York, to change the reserved channel from Channel *23 to Channel *17 and should amend the DTV Table of Allotments at Buffalo, New York, to change the reserved channel from Channel *32 to Channel *43.

Respectfully submitted,

WESTERN NEW YORK PUBLIC
BROADCASTING ASSOCIATION

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Its Attorneys

May 29, 1998

³ If, despite the Association's plea, the Commission determines that prior notice should be followed, the Association is attaching hereto a draft Notice of Proposed Rule making, pursuant to Section 1.401(c) of the rules, in order to expedite processing of this request.

To: The Commission

Released:

By the Chief, Allocations Branch:

3. Petitioner states that its retention of Station WNED-TV on Channel *17 on a reserved basis is a recognition of the reality that viewers and members in the Buffalo

region consider Channel *17 as the mainstay for area public television fare. Station WNED-TV on Channel *17 is long-established, is the more powerful of the two stations, has a more extensive signal reach, and is technically more advanced. Station WNED-TV's endowment from the sale of Station WNEQ-TV on Channel 23 will lead to enriched educational and community outreach services, will raise Station WNED-TV to the position of a major television and radio producers, and will enable it to acquire additional programs for both radio and television.

4. In addition, the proposed endowment fund will defray the costs, associated with converting by 2003 to digital broadcast service, which are not covered by federal and state grants. In this connection, petitioner has concluded that the costs for programming of the four new digital channels for Channel *17 and the four new digital channels for Channel 23 would be prohibitive, the unused channels would be wasted, and the costs for converting two stations yielding eight channels makes neither economic nor programming sense. Instead, following digital conversion, Station WNED-TV on Channel *17 will be increased from one channel to four and special receivers will enable viewers to select from among a menu of programs broadcast on Channel *17. Digital broadcast technology will place rising demands on broadcasters to acquire programs. Petitioner enjoys state-of-the-art production capabilities, and, through its endowment fund, programming by Station WNED-TV may be marketed through diverse broadcast and non-broadcast sources.

5. Petitioner notes that continuation of effective operations on Channel 23 has been an expensive and unproductive enterprise. Funds and resources have been drained from Station WNED-TV on Channel *17 and it has been difficult to program Channel 23 on any extended hourly basis. Because of cost constraints, Channel 23 operates only eight hours a day. It has been utilized primarily for certain programming which would not normally appeal to most of the viewing audience for Station WNED-TV.

6. Petitioner submits that it would be wiser to dispose of Station WNEQ-TV on Channel 23 through assignment and dedicate the proceeds of any such assignment in trust for the maintenance and improvement of Station WNED-TV on Channel *17. In the petitioner's view, this permits a realistic marshaling of public broadcasting dollars for the Buffalo, Western New York and Southern Ontario region. Accordingly, petitioner seeks to achieve self-sufficiency by a coordinated and consolidated public television service for the Buffalo area through enhancement of public television Station WNED-TV on Channel *17 and through assignment of its Station WNEQ-TV Channel 23 facilities in order to provide an endowment fund for Station WNED-TV on Channel *17.

7. We believe petitioner's proposal warrants consideration. The Commission believes that it would serve the public interest to solicit comments on the proposal, which will allow the petitioner and its public broadcast constituents to fully participate in the multi-channel DTV environment. This proposal does not propose to remove or add any channel, nor would it alter the total number of channels in Buffalo which are reserved for noncommercial educational use. Petitioner's proposal would simply

change the reservation for noncommercial educational use from one channel to another, both in the NTSC and in the DTV Tables of Allotments. We seek comments on the following proposed amendments if the NTSC and DTV Tables of Allotments:

NTSC TABLE OF ALLOTMENTS

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Buffalo, New York	2, 4, 7, 17 *23, 29, 49	2, 4, 7, *17 23, 29, 49

DTV TABLE OF ALLOTMENTS

Buffalo, New York	14, *32, 33, 34 38, 39, 43	14, 32, 33, 34 38, 39, *43
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8. The Commission's authority to institute rulemaking proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before _____ and reply comments on or before _____, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, DC 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

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(Counsel to Petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rulemaking proceedings to amend the TV Table of Allotments, Sections 73.606(b) and 73.622(b) of the Commission's rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rulemaking to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact _____. For purposes of this restricted notice and comment rulemaking proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rulemaking until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments: Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239) at its headquarters, 1919 M Street, N.W., Washington, D.C.